United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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P/S

76-1144

To be argued by
JAMES A. MOSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1144

UNITED STATES OF AMERICA,
Appellee,

—v.—

DAVID S. COURTNEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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TABLE OF CONTENTS

TABLE OF CASES

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Preliminary Statement

David S. Courtney appeals from a judgment of conviction entered on March 5 1976, in the United States District Court for the Southern District of New York after a one day jury trial before the Honorable Inzer B. Wyatt, United States District Judge.

Indictment 75 Cr. 1075, filed November 10, 1975, charged Courtney in one count with having stolen a typewriter belonging to the United States which had a value in excess of $100, in violation of Title 18, United States Code, Section 641.

On January 27, 1976, a jury found Courtney guilty of having stolen the typewriter, and further found that the value of the typewriter did not exceed $100.

On March 5, 1976, Courtney was sentenced by Judge Wyatt to a term of six months imprisonment. Courtney is at liberty on bail pending appeal.

Statement of Facts

The Government called five witnesses to testify at the trial. Each of these witnesses was an employee at the Bronx Veterans Administration Hospital at the time Courtney committed the theft for which he was convicted.

The first two witnesses—Mrs. Conception Tirado and Miss Barbara Dudeck—were dieticians at the hospital and shared an office on the second floor of the "D" Building in that hospital (Tr. 38, 61-62).* In the early afternoon of June 24, 1975, as she was walking toward her office, Miss Dudeck passed the defendant Courtney who was sitting on a chair near her office and the office of the hematology department. (Tr. 65-67). Shortly thereafter, between two and three o'clock, Miss Dudeck and Mrs. Tirado left their office to visit a patient. As they turned down the corridor in the direction of the hematology department, they both noticed Courtney leaving one of the hematology offices and carrying an object that was loosely wrapped in a plastic garbage bag. (Tr. 40, 42, 62-63, 72). As Miss Dudeck and Mrs. Tirado drew almost abreast of Courtney, they noticed that the object inside the garbage bag was a typewriter. (Tr. 41, 64). After they observed Courtney enter a stairwell at the end of the corridor, both women ran off in opposite directions to notify the security office of what they had just seen. (Tr. 43, 59, 64).

Miss Dudeck and Mrs. Tirado encountered Courtney again by accident less than a half hour later as he was

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* References to the trial transcript are abbreviated herein as "Tr."; and to Courtney's Brief as "Br."

being escorted to the hospital security office by security guards. Both women identified him at that time as the man they had seen taking the typewriter from the hematology office. (Tr. 45, 57, 65-66). In addition, Mrs. Tirado recalled at trial that she had seen Courtney on approximately fifty other occasions in the canteen area of the hospital prior to June 24, 1975. (Tr. 41).

James Gilliam, a security guard for the hospital, testified that on the afternoon of June 24, 1975, he was assigned to guard the Webb Avenue gate at the hospital and to watch the hospital parking lot adjacent to that gate. (Tr. 79-80). At approximately four o'clock, an employee of the hospital called Mr. Gilliam's attention to a typewriter and a plastic bag lying atop the typewriter. The typewriter and bag were partially concealed between an exterior air-conditioning unit and a hospital building near the Webb Avenue gate. (Tr. 79-81). Mr. Gilliam immediately contacted his superior officer, Mr. Owen Huntley, and delivered the typewriter and bag to him at the hospital's security office. (Tr. 81-82).

The fourth witness called by the Government was Leonard Levine, an employee in the supply division of the hospital. Mr. Levine testified that he had examined a typewriter shown to him by Mr. Huntley, the security chief, on the morning of June 25, 1975. (Tr. 85). At that time, Mr. Levine observed the serial number of the typewriter and, using that serial number, determined from his office records that the typewriter had been purchased by the hospital in 1968 for the price of $441.00 and had been charged to a unit within the hematology department. (Tr. 86-88). Government Exhibit 4, a computer printout indicating the $441.00 purchase price, was introduced into evidence through the testimony of Mr. Levine. (Tr. 87-91).

The fifth and final government witness was Owen Huntley, the chief of the security office at the hospital.

Mr. Huntley testified that on June 24, 1975, he was summoned to Room D-241 in the hematology department of the hospital in order to investigate the theft of a typewriter from that office. (Tr. 94). He spoke with Miss Dudeck and Mrs. Tirado and received from them a description of the man they had seen take the typewriter. Mr. Huntley then broadcast the description to other security guards by walkie-talkie and proceeded to the canteen area of the hospital, where he discovered an individual, the defendant Courtney, who fit this description. (Tr. 94-96). Subsequently, as Mr. Huntley and other guards were escorting Courtney to the hospital's security office, Miss Dudeck and Mrs. Tirado passed in the corridor and identified Courtney as the man they had seen taking the typewriter. (Tr. 97).

At approximately four o'clock that afternoon, Mr. Huntley received a typewriter and a plastic bag from James Gilliam, a security guard, which Gilliam said he had found behind Building "7" at the hospital. (Tr. 98). That afternoon, at Mr. Huntley's direction, an employee of the hospital's illustration department took a photograph of this typewriter and plastic bag (Government Exhibit 1), as well as a photograph of the underside of the typewriter (Government Exhibit 2) showing that a triangular piece had broken off the base of the typewriter, and a photograph of the desk in Room D-241 of the hospital showing the triangular piece still bolted to the top of that desk (Government Exhibit 3). These photographs were introduced into evidence through the testimony of Mr. Huntley. (Tr. 98-102).

Mr. Huntley further testified that on the following morning, June 25, 1975, he called Mr. Levine, an employee in the hospital's supply division, in order to ascertain to whom the typewriter was listed. (Tr. 102). Mr. Huntley also recalled that on June 24, 1975, Courtney had been an out-patient at the hospital. (Tr. 103).

At the close of the Government's case, Courtney rested without calling any witnesses or offering any exhibits into evidence.

ARGUMENT

POINT I

The evidence established that Courtney's violation of federal law was wilful and knowing.

Courtney's claim that the evidence was insufficient to establish the wilfulness of his violation of 18 U.S.C. § 641 is without merit. The evidence at trial clearly showed, and the jury found, that the defendant knowingly and wilfully took a typewriter which belonged to the Bronx Veterans Administration Hospital and disposed of it in a manner inconsistent with the ownership rights of the hospital.

As Courtney himself concedes (Br. at 6), the criminal intent which the Government was required to prove was the intent of the defendant merely to deprive the Government of its property without its consent. *United States* v. *Barlow*, 470 F.2d 1245 (D.C. Cir. 1972).

The testimony of Miss Dudeck and Mrs. Tirado, coupled with the photographic evidence in Exhibits 1-3, established that Courtney literally "ripped off" the typewriter from the desk at the hospital to which it had been bolted and lugged it down a hospital corridor and stairwell. The testimony of security guard James Gilliam circumstantially established that Courtney hid the typewriter outside another hospital building near the Webb Avenue gate of the hospital and the adjacent hospital parking lot. It is hard to conceive from this evidence how the jury could have concluded other than that Court-

ney purposefully intended to deprive the hospital of the rightful use of its typewriter.*

In constructing his argument concerning the sufficiency of the evidence, Courtney has utterly failed to give full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact. *United States* v. *Harris*, 435 F.2d 74, 88 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir. 1974); *Curley* v. *United States*, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). Courtney's attack on the sufficiency of the evidence below amounts to nothing more than an attempt to lure this Court into sitting as a "super jury" to which counsel seeks to address an appellate summation. This Court has repeatedly declined to assume the role which Courtney seeks to have it fill. *E.g.*, *United States* v. *Kahaner*, 317 F.2d 459, 467-68 (2d Cir. 1963), *cert. denied sub nom.*, *Corallo* v. *United States*, 375 U.S. 835 (1963). When the evidence is examined in the light most favorable to the Government—as it must be once a jury has evaluated the proof and unanimously rejected the arguments of defense counsel, see, *e.g.*, *United States* v. *Glasser*, 315 U.S. 60, 80 (1943); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972); *United States* v. *Tadio*, 223 F.2d 759 (2d Cir.), *cert. denied*, 350 U.S. 874 (1955)—it is clearly sufficient to support the jury's determination of guilt. Indeed, it is difficult to imagine the jury arriving at any other conclusion.

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* Courtney argues that his larceny could be interpreted as "disruptive behavior without any criminal intent." (Br. at 6). This argument avails Courtney nothing. "Disruptive" or not, an appropriation of government property for a use inconsistent with the ownership rights of the government constitutes a violation of 18 U.S.C. § 641. *Ailsworth* v. *United States*, 448 F.2d 439, 442 (9th Cir. 1971). In any event, this argument concerns a possible inference to be drawn from the evidence and, as such, it could be properly addressed to a jury, but not, after its rejection by that body, to an appellate court.

POINT II

Judge Wyatt's ruling that if Courtney testified the Government could cross-examine him on his prior felony convictions was not an abuse of the Judge's discretion.

Courtney was convicted of armed robbery in the state courts of New Jersey in 1973. At a conference held several weeks prior to the trial below, Courtney's attorney, Mr. Cantor, presented Judge Wyatt with a copy of Courtney's "rap sheet" and requested that the Court forbid the Government from cross-examining Courtney on all prior felony convictions. (Transcript of January 13, 1976 hearing, at 18-22). Courtney now claims that the Court's ruling was improper, in that the Court failed to conduct a hearing on the admissibility of prior convictions, as, he claims, it was required to do by Rules 104(c) and 609 of the Federal Rules of Evidence.

Courtney's claim is without merit and is foreclosed by the very decisions cited in his appellate brief, *United States* v. *Puco*, 453 F.2d 539 (2d Cir. 1971); *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969); *United States* v. *DeAngelis*, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965); and *Gordon* v. *United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). Judge Wyatt was eminently correct in ruling that any prior felony conviction, *viz.* Courtney's 1973 armed robbery conviction, would be admissible on the issue of the defendant's credibility. It is well recognized that crimes involving moral turpitude, such as stealing, reflect on honesty and integrity, and thereby on credibility. *United States* v. *Palumbo*, *supra*, 401 F.2d at 273; *United States* v. *Puco*, *supra*, 453 F.2d at 543; *Gordon* v. *United States*, *supra*, 383 F.2d at 940;

United States v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). In allowing proof of the prior robbery to be used to impeach Courtney's credibility, Judge Wyatt exercised a discretion "accorded a respect appropriately reflective of the inescapable remoteness of appellate review." *Luck* v. *United States*, *supra*, 348 F.2d at 769.

Courtney has not claimed on this appeal that Judge Wyatt's decision to permit impeachment using the prior armed robbery conviction was incorrect. Instead, Courtney contends for the first time on this appeal, and without any judicial support whatsoever, that Judge Wyatt was required to conduct a full evidentiary hearing before he could rule that Courtney's prior conviction was admissible.*

Having failed to present this novel notion to Judge Wyatt at the pre-trial conference below, the defendant may not now raise this contention before this Court. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Furthermore, in making this argument, Courtney overlooks the fact that he *was* given a "hearing" on the

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* Courtney suggests that Rules 104(c) and 609 of the Federal Rules of Evidence, when read together, *require* that an evidentiary hearing be conducted by the trial judge outside of the jury's presence in order to "develop the pertinent facts sufficiently so that [the judge] can meaningfully exercise his discretion." (Br. at 9). Neither Rule 609 nor Rule 104(c), read together or separately, mandates such a hearing. Furthermore, none of the cases cited in Courtney's brief suggest that such a hearing must be held. Instead, each of these cases bestows the trial judge with the discretion to do exactly what Judge Wyatt did below—*i.e.* orally conduct a factual inquiry of defense counsel and the attorney for the Government. See, *e.g.*, *United States* v. *DeAngelis*, *supra*, 490 F.2d at 1009; *Gordon* v. *United States*, *supra*, 383 F.2d at 939.

admissibility of his prior convictions when he raised this issue before Judge Wyatt at the pre-trial conference. At that conference it was his burden to convince the Court that his past criminal record should be ruled inadmissible —a burden which he utterly failed to meet.* (Transcript of January 13, 1976 hearing, at 19-20); *Gordon* v. *United States*, *supra*, 383 F.2d at 939. It follows that the robbery conviction, which met all of the requirements of Rule 609, was properly admissible to impeach the defendant.

POINT III

The introduction into evidence of photographs of the stolen typewriter was not error.

Notwithstanding his concession that "the [best evidence] rule does not require that chattels be introduced into evidence" (Br. at 11), Courtney nonetheless claims that the admission of black and white photographs of the stolen typewriter, instead of the typewriter itself, was so "prejudicial" as to outweigh any probative value of this evidence.

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* Although Courtney asserts that "[n]o attempt was made [by Judge Wyatt] to determine what the felony convictions were or when the convictions took place" (Br. at 9), this is far from the truth. During the January 13, 1976 pre-trial conference (at pages 19-20), Judge Wyatt studied a copy of the defendant's rap sheet and asked Courtney's attorney, Mr. Cantor, to point out to him those entries on the rap sheet as to which the defense wanted a ruling. At that time, Mr. Cantor was unable to provide the Court with any particular information concerning any conviction of his client. Indeed, it was apparent that Mr. Cantor was himself unaware as to which items on Courtney's rap sheet represented convictions and which represented merely arrests.

This contention, meritless on its face, is rendered frivolous by Courtney's further explanation that "prejudice" flows from the pictures' depiction of the typewriter and plastic garbage bag "exactly as described by the witnesses who saw the defendant allegedly carrying a typewriter." * (Br. at 11). Thus, Courtney appears to be arguing, in a circle, that the probative value of the pictures is outweighed by the prejudice, which arises because the pictures are too probative.

The simple fact, as Judge Wyatt recognized, is that the objection which Courtney raised to the introduction of these photographs "has to do with the weight of the evidence, not as to its admissibility." ** (Tr. 100).

POINT IV

The Assistant United States Attorney did not comment upon defendant's failure to testify.

Courtney further claims that the Assistant United States Attorney commented improperly to the jury upon the defendant's failure to take the stand in his own defense. In support of this claim, Courtney contends that:

> "[d]uring his summation the prosecutor, commenting on other possible explanations to the evidence adduced at trial, stated 'What are they?

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* Contrary to defendant's contention, the picture of the typewriter and plastic bag (Exhibit 1) does not depict those objects as they were observed by Miss Dudeck and Mr. Tirado. Both women testified that they observed a small part of the typewriter *inside* of a plastic bag. Exhibit 1, of course, depicts most of the typewriter, with the plastic bag lying *on top of* part of its carriage.

** Rule 1002 of the Federal Rules of Evidence, which states the "Best Evidence Rule" for federal courts, applies only to originals of a "writing, reading or photographs," and not to objects such as the typewriter in this case.

> Has he (meaning the defendant) given one explanation for why a typewriter is found between an air-conditioning unit and a building near a parking lot?" (Br. at 13).

This argument is a classic example of the distortion that results when statements are isolated and presented out of their proper context. The remarks of the Assistant United States Attorney to which Courtney objects referred neither to Courtney nor to his failure to testify. Rather, these remarks addressed the failure of Courtney's *attorney*, Mr. Kramer, to furnish the jury with even one innocent explanation for the Government's evidence, after Mr. Kramer had told the jury in his summation:

> "The fact that a typewriter was found in the grounds is indicative of many other things. It could be many other explanations, enough of which to raise a reasonable doubt in any individual's mind." (Tr. 120).

The entire context of the Assistant United States Attorney's remarks is as follows:

> "The Court: Mr. Moss, any rebuttal?
>
> Mr. Moss: Yes, Your Honor. Your Honor, ladies and gentlemen, I want to deal briefly with three points that were just raised by Mr. Kramer.
>
> He suggested toward the end of his remarks that there may be many other reasonable explanations to the evidence you heard today. What are they? Has he given one explanation for why a typewriter is found between an air-conditioning unit and a building near a parking lot?" (Tr. 121-22).

Notwithstanding Courtney's distorted, partial recitation of the record, there was no comment to the jury upon the failure of Courtney to take the stand in his own defense.

POINT V

The form of the jury's verdict and the manner by which it was reached were entirely proper.

Finally, Courtney contends that because the jury found the value of the typewriter to be less than $100.00, when the only evidence adduced at the trial proved that the typewriter was purchased in 1967 for $441.00, the verdict was "totally inconsistent with the evidence" and must be set aside. (Br. at 15). This claim is similarly untenable.

In submitting the issue of the typewriter's value to the jury, Judge Wyatt used a verdict form providing for a finding of guilt or innocence as to the theft and, if the defendant was found guilty, for a separate finding as to whether the value of the stolen typewriter exceeded $100.00. (Tr. 135). Such a verdict form has received appellate approval, in that it properly divorces the question of value, which deals only with punishment, from the question of guilt. *Jalbert* v. *United States*, 375 F.2d 125 (5th Cir. 1967).

In the course of its deliberation, the jury first determined the defendant guilty of the theft charged in the indictment. (Tr. 145). Only after its verdict as to guilt was recorded and it had retired again to determine the typewriter's value, did the jury conclude that the value did not exceed $100.00. (Tr. 141). Clearly, the verdict of guilt was not a "compromise verdict," as claimed by Courtney. It merely reflected the jury's obvious finding that the value of a seven-year-old typewriter is considerably less than its original purchase price. See *United States* v. *Clutterbuck*, 421 F.2d 485 (9th Cir. 1970).

Moreover, even were this verdict the result of a compromise between disparate factions within the jury, this fact is not a sufficient ground for setting aside the verdict.

Both this Court and the Supreme Court have held on numerous occasions that an appellate court will not probe behind a verdict based on sufficient and properly admitted evidence, to determine that verdict's "consistency" or "rationality." *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960); *Dunn* v. *United States*, 284 U.S. 390 (1932); *Steckler* v. *United States*, 7 F.2d 59 (2d Cir. 1925); *cf.*, *United States* v. *Zane*, 495 F.2d 683, 692 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JAMES A. MOSS,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JMAES A. MOSS being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 11th day of June, , 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Robert kramer, Esq.
Cantor & Kramer
201 W. 72nd Street
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

James A. Moss

Sworn to before me this

11th day of June, 1976.

Maria A. Morales

MARIA A. MORALES
NOTARY PUBLIC, State of New York
No. 31 - 4521851
Qualified in New York County
Term Expires March 30, 1978